IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

Case No: 380/99

In the matter between

JASON LEE SHACKELL
Appellant

and

THE STATE **Respondent**

BEFORE: **Nienaber, Olivier JJA and Brand AJA**

Heard on: **17 May 2001**

Delivered on: **30 May 2001**

Recusal of judicial officer - expert's opinion based on unproven facts - role of inherent improbabilities in criminal case - sentence for culpable homicide.

J U D G M E N T

BRAND AJA

[1] During the early hours of 24 September 1997 and at the Brighton Beach police station in Durban, Sipho Shozi ("the deceased") was fatally wounded by a gunshot from a firearm which the appellant held in his hand at the time. In the event, the appellant was arraigned for murder in the Durban and Coast Local Division before Kondile J and two assessors. He pleaded not guilty. His explanation that the shot went off by accident was rejected and he was convicted of murder and sentenced to 20 years imprisonment.

[2] His appeal to this Court, with the leave of the Court *a quo*, is against both the conviction and the sentence. Regarding the conviction the appeal is based on a special entry relating an alleged irregularity in terms of s 317 of the Criminal Procedure Act 51 of 1977 as well as on the merits.

BACKGROUND

[3] The background facts are for the most part common cause. At the time of the tragic incident, the appellant was a reservist in the South African Police Services, stationed at Brighton Beach police station. During the night of 23 and 24 September 1997 and while the appellant was on duty, the deceased was temporarily detained in one of the cells at the station. According to the investigating officer in the case, inspector Gouws, the deceased was detained for his own protection as he was mentally deranged. When the appellant returned to the station at the end of his shift the deceased

was causing a disturbance in his cell. The appellant went, without any comment, from the charge office where other policemen were also present to the cells. Shortly thereafter the policemen in the charge office heard a shot. The appellant returned to the charge office, apparently in a state of severe shock. He handed over his service pistol to one of his colleagues with the words "I shot the guy".

[4] The other policemen immediately went to the deceased's cell. They found the solid door of the cell open but the grille door behind it locked. The deceased was lying dead in a pool of blood, behind the locked grille door. The post-mortem examination performed by a forensic pathologist, Dr Naidoo, revealed that the deceased was instantaneously killed by a gunshot wound through his mouth which ultimately transected his brain stem.

[5] Inspector Gouws interviewed the appellant about three hours after the event. His observation was that the appellant was still in a state of shock. He noticed that two of the appellant's shirt buttons were torn off. He asked the appellant whether he had anything to say whereupon the appellant indicated certain scratch marks to his chest area. Gouws did not take any particular note of the these scratch marks but accompanied the appellant to the district surgeon who examined him and completed a standard observation form, known as form J88. To this form J88 which was handed in at the trial as exhibit D, I will presently return.

[6] The only person who can explain why and how the fatal gunshot was fired at the deceased, is the appellant. According to his testimony at the trial he heard a commotion from the deceased's cell. He decided that the deceased might need help and went to his assistance. He found the solid door of the deceased's cell standing open but the grille door behind it locked. The deceased was acting like a mentally deranged person running

into the walls of his cell, shouting inappropriate threats and proclaiming that he was God Almighty.

[7] While the appellant was standing next to the grille door the deceased suddenly approached him. He grabbed the appellant's shirt front through the bars with both hands and pulled the appellant towards himself and against the door with great strength. His service pistol, so the appellant testified, was in a holster at his side. Suddenly the deceased tried to grab the pistol from its holster. The appellant succeeded in wrenching his pistol away from the deceased which he thereupon held behind his back. At the same time the deceased continued to pull the appellant by the front of his shirt against the bars of the door. The appellant explained that he was unable to resist with the one free hand only and that he instinctively brought his other hand, in which he held his pistol, forward in order to push himself away from the bars with both hands. As he stepped backwards he tripped and stumbled. In the process a shot unexpectedly went off which struck and killed the deceased. The appellant accepted that the pistol must have been cocked with its safety catch in an off position. As to how it came about that he was carrying a cocked and unsafe firearm in his holster, the appellant could only speculate that he must have forgotten to uncock the weapon and make it safe after he attended to an alarm call earlier that night.

[8] As to the scratch marks to his chest area referred to by the investigating officer and noted by the district surgeon, Dr Damerell, in exhibit D, the appellant's testimony was that these marks were caused by the deceased during their struggle when two of his shirt buttons were ripped off.

[9] Dr Naidoo, the forensic pathologist, who was called primarily to testify about his post-mortem examination on the body of the deceased, was referred by the state advocate to exhibit D and asked to comment on the contents thereof. The response of the appellant's counsel was that he had no objection to Dr Naidoo referring to the document subject to proper proof of the document in due course. He made it clear, however, that the exact content of exhibit D was not admitted.

[10] The only relevant clinical findings noted in exhibit D are: "scratch marks upper chest" and "slightly tender abdomen". Part of exhibit D consists of a diagram of the human body. With reference to the scratch

marks on the appellant's chest the district surgeon drew three parallel lines, which are slightly sloping but predominantly vertical, on both sides of the diagram of the chest.

[11] With reference solely to the diagram in exhibit D Dr Naidoo expressed the view that these scratch marks could "possibly" have been self-inflicted. In support of this view Dr Naidoo relied on a passage from an academic publication the relevant portion of which reads as follows:

> "The following features assist in the recognition of self-inflicted incised injuries: (a) the cuts are usually superficial and rarely any danger to life, etcetera; (b) the incisions are regular with an equal depth at origin and termination, etcetera; (c) the cuts are usually multiple and often parallel. They avoid vital and sensitive areas, usually being drawn on the cheeks, ..., chest, etcetera. This is inconsistent with an attack by another person as the victim is unlikely to stand still to allow these multiple delicate and uniform injuries to be carefully executed."

[12] Referring to this passage, Dr Naidoo placed particular emphasis on the fact that, according to the diagram in exhibit D, the scratch marks on the appellant's chest were parallelly drawn. He cautioned, however, that his suggestion that the scratch marks might be self-inflicted could not be regarded as anything more than a mere possibility, particularly since the factual basis for his suggestion was a simple line drawing by another doctor without any indication as to the depth, spacing or exact location of the

marks. The district surgeon who observed the scratch marks and completed exhibit D, although available to the State, was deliberately not called as a witness. Nor was the matter taken up in any detail during the cross-examination, of the investigation officer, Gouws, or of the appellant himself. As a consequence, the exact nature of these scratch marks was never properly examined or established at the trial.

[13] The Court *a quo* rejected the appellant's version as to how it came about that the fatal shot was fired. With reference to the scratch marks on the appellant's chest, the trial Court found that these injuries were inflicted either by the appellant himself or that "they were inflicted by a colleague [of the appellant] or some other person with his consent as a possible cover-up". It is apparent from the Court's judgment that this finding of a cover-up which was primarily based on Dr Naidoo's conjectures played a significant role in the rejection of the appellant's evidence.

THE SPECIAL ENTRY

[14] This bring me to the circumstances surrounding the special entry of an alleged irregularity. Sentence was imposed on 22 June 1999, that is, about four months after the appellant's conviction on 10 February 1999. Shortly after passing of sentence the appellant brought an application for leave to appeal against both conviction and sentence as well as an application for a special entry. Both these applications were granted. The irregularity alleged in the special entry was that:

> "1 ... [H]aving regard to the fact that:
>
> 1.1 the accused who is a white policeman was alleged to have killed the deceased (who was a young black male) whilst the deceased was in custody in police cells;

1.2 Gcinisizwe Kwesi Kondile a young black male, he being the presiding judge's son was murdered by white policemen whilst in custody:

The presiding judge ought *mero motu* to have recused himself, alternatively, he ought to have appraised the accused of the facts mentioned in 1.2 so as to enable the accused to apply for his recusal."

[15] It is common cause that the appellant is white while the deceased was a young black male. It is also common cause that the son of the learned judge *a quo,* Gcinisizwe Kondile ("Kondile"), was murdered by white policemen during July 1981 while he was in police custody.

[16] From the affidavit filed in support of the application for a special entry it appears that four of the policemen who were responsible for the murder of Kondile applied for amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995. The hearing before the amnesty committee took place during February 1999 and the committee delivered its written decision granting amnesty on 23 February 1999. From the written decision it emerges that Kondile was a trained member of the military wing of the African National Congress ("the ANC"). The four applicants for amnesty were members of the security branch of the South African Police ("the security police") at the time and stationed in Port Elizabeth. During July 1981 Kondile was detained by the security police. While in detention it was proposed to him that he become a "double agent" and that as such he would provide the security police with information on

the military wing of the ANC. Despite initial resistance he eventually pretended to be agreeable to do so. As a result certain confidential information of the security police was divulged to him in preparation for his proposed role as a double agent. Thereafter the security police discovered that Kondile never genuinely intended to co-operate with them and that he had in fact informed the ANC about their proposal. He was then taken to Komatipoort on the Mozambiquan border and brutally murdered by members of the security police, including the four applicants for amnesty. Thereafter the police falsified their own official records to cover up their evil deed. According to the appellant these facts surrounding the tragic death of the learned judge's son only came to his knowledge after his conviction.

RECUSAL

[17] Against this background I propose to deal at the outset with that part of the appeal which is based on the special entry. The proper approach to an application for judicial recusal was considered in two recent judgments of the Constitutional Court, i e *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) ("the SARFU-case") and *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) ("the SACCAWU case"). It was also considered by this Court in *S v Roberts* 1997 (2) SACR 243 (SCA) and

in the hitherto unreported decision in *S Sager v N Smith* delivered on 12 March 2001 under Case Number 185/99.

[18] In the SARFU-case it was decided (in par 30) that an application for the recusal of a judicial officer raises a "constitutional matter" within the meaning of s 167 of the Constitution. Since the Constitutional Court is the highest court in constitutional matters its approach is decisive. It stated in par 48:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

[19] The approach thus formulated in the SARFU-case was refined in the SACCAWU-case. I do not propose to restate all the principles that were articulated by the Constitutional Court in those two cases. I will only highlight those that are of particular relevance in this matter. First, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge will not be impartial.

[20] Secondly, the test is an objective one. The requirement is described in the SARFU and SACCAWU cases as one of “double reasonableness”. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the applicant must also be reasonable. Moreover, apprehension that the judge *may* be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the judge *will* not be impartial.

[21] Thirdly, there is a built in presumption that, particularly since judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus to rebut the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ in the SACCAWU-case (par 15) the purpose of formulating the test as one of "double-reasonableness" is to emphasise the weight of the burden resting on the appellant for recusal.

[22] Fourthly, what is required of a judge is judicial impartiality and not complete neutrality. It is accepted that judges are human and that they bring their life experiences to the bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.

[23] With these guiding principles in mind I now turn to the appeal on the special entry. The appellant's main contention in support of this part of the appeal is that the circumstances surrounding the death of Kondile are so similar to the circumstances of the present matter that the learned judge should have recused himself alternatively that, had these circumstances been made known to the appellant before or during the trial he would be able to bring a successful recusal application. The similarities relied upon are essentially the following:

(a) both the deceased and Kondile were black;

(a) both were killed while in custody of the police;

(b) both men were killed by white policemen; and

(c) in both cases there was the suggestion that the police subsequently tried to cover up their evil deeds by devious means.

[24] The appellant concedes that the two incidents are far removed in time, place and nature. His expressed concern is, however, that at the time of the trial the decision in the amnesty application of Kondile’s murderers was imminent; it was in fact delivered a few days after the appellant's conviction. In the circumstances, so the appellant maintains, the tragic circumstances surrounding the death of the learned judge’s own son would have been especially fresh in his mind during the trial.

[25] In considering these arguments the fact that the trial coincided with the amnesty hearing of Kondile's murderers and the broad similarities between the facts of this case and those surrounding the death of the learned judge's son cannot be ignored. However, there are also significant differences between the two cases which I find unnecessary to enumerate. These differences were conceded by the appellant's counsel in argument and I consider them to be self-evident. The ultimate test is whether, having regard to all the similarities and all the differences between the two cases as well as to the other considerations underscored by the Constitutional Court in the SARFU and SACCAWU-cases, the reasonable man would reasonably have apprehended that the trial judge would not be impartial in his adjudication of the case. The norm of the reasonable man is, of course, a legal standard. In bringing that legal standard to bear on the present facts the appellant has in my view failed by a substantial margin to rebut the weighty onus which rested on him.

[26] In support of his appeal based on the special entry the appellant sought to rely on a second line of argument. Underlying it is the finding by the Court *a quo* that the scratch marks on the appellant's chest were inflicted either by the appellant himself or by some other person, e g one of his colleagues, as a "cover-up". This finding, the appellant contends, is so devoid of any foundation in the evidence that it can only be attributed to bias on the part of the learned judge. In considering this argument I accept, without deciding at this stage, that the finding complained of is indeed as devoid of merit as contended for by the appellant. Even on that supposition I believe there are two answers to the argument. First, the applicant's case is based on a reasonable apprehension of bias, not on actual bias. Although inferences from unsupported findings in a judgment may conceivably support an *ex post facto* conclusion of actual bias, they cannot

support mere apprehension of bias entertained at a stage prior to judgment. Secondly, I do not agree that the reasonable man would infer bias on the part of the judge as the most likely reason for his unwarranted factual findings. An at least equally likely inference would be that the judge was simply mistaken. Even the most impartial judges sometimes commit themselves to errors of reasoning which, with hindsight, appear to be obvious. The remedy for such errors is an appeal on the merits, not an *ex post facto* application for the recusal of the judge.

THE MERITS OF THE CONVICTION

[27] I now turn to consider the appeal against conviction based on the merits. In this part of the appeal the appellant once again relies heavily on the finding by the Court *a quo* relating to the scratches on his chest. This time it is relied upon in support of the proposition that the Court's credibility findings against the appellant cannot be sustained. As appears from the judgment the finding regarding the scratch marks was based on the views expressed by Dr Naidoo. The first contention on behalf of the appellant is that there was no factual foundation in the properly admitted evidence for the views expressed by Dr Naidoo. I agree with this contention. Dr Naidoo's views are entirely based on the contents of exhibit D. This document was prepared by another doctor and it was clearly stated by the appellant's counsel at the time that any reference to the document was

subject to subsequent proof. Despite this clear position taken by the defence, the State failed to call the author of the document as a witness, without any explanation for such failure. Indeed, counsel for the State informed this Court that the decision not to call Dr Damerell was a deliberate one. In these circumstances it is self-evident that exhibit D was never properly introduced in evidence. To assert, as was stated in the judgment of the Court *a quo*, that the presence of the scratch marks on the appellant's chest was never in dispute, is no answer. Dr Naidoo's opinion was not based on the mere presence of the marks but on the suggestion that these marks were parallel. The sole source for this suggestion is exhibit D . If exhibit D is ignored, as it should have been, Dr Naidoo's views as to how the appellant's injuries could have been inflicted are without any factual foundation and ought therefore to have been disregarded as irrelevant academic speculation.

[28] I am also in agreement with the appellant’s further contention, namely that on a proper interpretation of Dr Naidoo’s evidence it does not in any event support the Court *a quo's* finding as to the manner in which the appellant’s injuries were sustained. The view expressed by Dr Naidoo was that, on the assumption that the scratch marks were parallel, the possibility cannot be excluded that they were self-inflicted. He made it plain, however, that he could not state as a fact that the scratch marks were indeed

parallel since he was relying on what he described as “simple line drawings by another doctor”. Thus understood, it is apparent in my view that the finding of the Court *a quo* (that the scratch marks must have been inflicted by the appellant himself or by some other person with his consent), cannot be justified on the evidence of Dr Naidoo. As a result, one of the Court's most important reasons for rejecting the appellant's evidence is unfounded.

[29] Can the rejection of appellant's version be sustained on other grounds? The only other reason emerging from the judgment of the Court *a quo* is that the appellant's version was said to be inherently improbable. In support of this finding as to the improbability of appellant's version, reference was made to the facts that:

(a) the appellant only referred to his injuries and to his shirt buttons that were torn off, about three hours after the event;

(b) the appellant, who weighed about 85 kilograms, alleged that he was unable to pull himself away from the deceased who weighed only 58 kilograms;

(c) the firearm would be pointing towards the deceased during the struggle, as described by the appellant;

(d) the appellant did not ask one of his fellow policemen to accompany him to the cell;

(f) the deceased would have been able to hold the appellant with one

hand against the bars after he had reached out to grab the appellant's firearm with his other hand.

[30] Though I am not persuaded that every one of these suggested inherent improbabilities can rightfully be describe as such I do not find it necessary to dwell on each of them in any detail. There is a more fundamental reason why I do not agree with this line of reasoning by the Court *a quo*. It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the

appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence the matter must be decided on the appellant's version. According to the appellant's version he never intended to fire a shot. On the acceptance of this version there is no room for a finding of *dolus* in any of its recognised forms. If follows that the conviction of murder cannot stand.

ALTERNATE FINDINGS ON THE MERITS

[31] This, is not however, the end of the matter since, it is necessary to enquire whether the appellant is not, on his own version, guilty of culpable homicide. On his own version he was walking around with a loaded, unsafe, cocked pistol. He then he approached so close to the grille door of the cell that the person detained inside was able to grab his pistol through the bars of the door. To the appellant's knowledge, that person was mentally deranged. He was acting in an erratic manner and was clearly capable of utterly irrational and dangerous conduct. When the risk created by the appellant materialised in that the deceased grabbed for his pistol, the appellant did not try to rid himself of the pistol. Instead, he proceeded to wrestle with the deceased while still holding the pistol in his hand. When he lost his footing the shot went off that fatally wounded the deceased. The conduct of the appellant, thus described by himself, fell short of what is required of the reasonable man. The appellant's conduct was according

negligent. His negligent conduct was a direct cause of the deceased's death. On his own showing the appellant is guilty of culpable homicide.

SENTENCE

[32] The sentence of 20 years imprisonment imposed by the court *a quo* is patently inappropriate for culpable homicide. Consequently, this Court is to impose a fresh sentence. In considering an appropriate sentence this Court is in the fortunate position of having before it a relatively complete picture of the appellant as a person due to the testimony of three expert witnesses that was placed before the Court *a quo.* One of these experts was a clinical psychologist in private practice. The other two were both trained social workers employed by the Department of Correctional Services as a probation officer and a correctional supervision official respectively. The salient facts emerging from their evidence appears from what follows. The appellant was 27 years of age at the time of the offence. He was unmarried with no dependants. He was a first offender. Though of average intelligence, the appellant was diagnosed at an early age as having a slight brain disfunction. He received remedial education from grade 3 to grade 9. In grade 10 he returned to mainstream education where he succeeded in matriculating in 1991. At the time of the offence he was employed as a clerk

with the Durban City Police. He had volunteered to be a police reservist because he wanted to be of service to the community. The appellant's personality is characterised by "submissive dependency". He has low self-esteem and lacks confidence. He is not an aggressive type of person and is described by his family as "a big loveable teddy bear with little physical strength". The appellant suffered from post-traumatic stress and was treated for this. He was remorseful while maintaining his innocence.

[33] Having regard to all the circumstances, the three expert witnesses were unanimous in their opinion that the imposition of a lengthy period of imprisonment would destroy rather than rehabilitate the appellant. All three experts recommended that the appellant be sentence to a period of correctional supervision and that he should be compelled to attend a life skills programme and psychological counselling as part of the conditions of that sentence.

[34] As was pointed out in *S v Lister* 1993 (2) SACR 228 (A) 232, the focus of expert witnesses such as psychologists and welfare officials differs from that of a sentencing court. While these experts are concerned solely with the well-being and the rehabilitation of an accused person the sentencing court must have regard to other aims of sentencing as well, such as punishment and retribution.

[35] The crime committed by appellant is a serious one. The deceased was detained in the custody of the police also for his own protection. Instead he lost his life through the negligence of a policeman. The appellant's negligence, moreover, was one of a high degree. But having said that I am not convinced that the appellant's crime, being one of negligence rather than intent, is so serious that the punitive and retributive

demands of sentence can only be given effect to through direct imprisonment. All the recognised aims of sentencing can be achieved, I believe, by the imposition of the kind of sentence recommend by all three experts as most appropriate i e correctional supervision.

[36] No evidence was placed before the Court *a quo* which would enable this Court to formulate the conditions of correctional supervision. The major components of the sentence will obviously have to be house arrest and community service. Unless the sentencing court is fully informed of the extent to which these two components will impinge upon the appellant's liberty, employment and social interaction, their effect can be so harsh as to defeat the purpose of imposing a non-custodial sentence. The most appropriate way of enabling the sentencing court to impose suitable conditions is for the correctional supervision official to investigate the matter and to make specific recommendations regarding the nature and extent of

house arrest and community service. The appellant should also be given an opportunity of dealing with all the relevant issues which arise in that connection.

[37] The following order is accordingly made:

(a) The appeal succeeds.

(b) The conviction of murder is set aside and a conviction of culpable homicide is substituted therefor.

(c) The sentence of 20 years imprisonment is set aside.

(d) The matter is remitted to the Court *a quo* for the imposition of a sentence of correctional supervision for a period of tree years in terms of section 276 (1) (h) of the Criminal Procedure Act 51 of 1977, after the information and recommendations which the Court considers necessary for the imposition of appropriate conditions has been obtained and the appellant had been given an opportunity of being heard in regard thereto.

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BRAND

AJA

CONCUR:

Nienaber JA

Olivier JA